



**Musungu v Musungu (Environment & Land Case 32 of 2019)
[2023] KEELC 21547 (KLR) (16 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21547 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 32 OF 2019**

BN OLAO, J

NOVEMBER 16, 2023

BETWEEN

FRANCIS OLOO MUSUNGU PLAINTIFF

AND

ALFRED NYONGESA MUSUNGU DEFENDANT

RULING

1. Francis Oloo Musungu (the Applicant herein) moved to this Court vide his Originating Summons dated 29th March 2019 in which he impleaded Alfred Nyongesa Musungu (the Respondent herein) seeking the main remedy that he has acquired by way of adverse possession half of the land parcel No South Teso/Apokor/421 (the suit land).
2. The Respondent resisted the claim vide his replying affidavit dated 10th September 2019.
3. For several reasons including the illness of Applicant's then counsel Mr Fwaya (who eventually withdrew from the case) and also the Applicant's absence, OmolloJ dismissed his case on 6th October 2021 primarily due to his absence.
4. The Applicant has now filed for my determination a Notice of Motion dated 28th July 2022 predicated under the provisions of Sections 3A and 63(e) of the *Civil Procedure Act*, Order 12 Rule 7 and Order 51 Rule 1 of the *Civil Procedure Rules* as well as all other enabling provisions of the law. He seeks the following orders:
 1. That the orders issued on 6th October 2021 dismissing the Applicant's suit for non-attendance be set aside and the Applicant's suit be re-instated for hearing and determination on the merits.
 2. That costs of the application be provided for.
5. The gravamen of the application is that having instructed the firm of Gabriel Fwaya Advocates to act for him in this matter, the Applicant was surprised when he visited counsel's office in December 2021



- only to find that his case had been dismissed on 6th October 2021 due to his absence. That his absence was not deliberate and now the Respondent wants to remove him from the suit land where he has lived all his life. That the suit land was passed on to him by his late father Ochudi Esemegat.
6. The rest of the averments in the Applicant's affidavit are really a discussion of how many sons his father and mother Anna Amusuguhad and how they moved onto the suit land which are really not necessary for purposes of this application. Indeed he has even annexed to his application two family trees which is really an issue to be brought up at the trial.
 7. The Respondent filed grounds of opposition dated 7th November 2022 raising the following issues:
 1. The application is frivolous, vexatious and a total abuse of the Court process.
 2. The application is misconceived, brought in bad faith and fettered by latches.
 3. The application lacks merit.
 8. The record shows that by an application dated 6th October 2021 Mr James Barasa Were of the firm of Gabriel Fwaya Advocates sought to cease acting for the Applicant. However, when the application came up on 6th October 2021, Mr Fwaya informed the Court that he was having challenges paying for it as well as for the Court Adjournment Fees. The Applicant's suit was dismissed but on 4th January 2022, the Applicant filed a Notice to act in person. The firm of Wanyama & Company Advocates subsequently came on record for the Applicant on 29th 2022.
 9. The application has been canvassed by way of written submissions filed both by Mr Wanyama instructed by the firm of Wanyama & Company Advocates for the Applicant and by Mr Omondi instructed by the firm of Omondi & Company Advocates for the Respondent.
 10. I have considered the application, the grounds of opposition and the submissions by counsel.
 11. I shall start with whether or not Mr Wanyama is properly on record for the Applicant. It is the submission of Mr Omondi that Mr Wanyama is not properly on record for the Applicant because he has filed his Notice of Appointment after the Applicant's suit was dismissed and without leave of the Court. That this is an affront to the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* since the dismissal order by Omollo J on 6th October 2021 amounts to a judgment. Mr Wanyama did not address that issue.
 12. As already stated above, the Applicant was previously represented by the firm of Gabriel Fwaya Advocates who came on record on 15th August 2019. The Applicant had earlier on 17th April 2019 filed his Originating Summons in person. The relationship between Mr Fwaya and the Applicant appears to have hit some turbulence and on 6th October 2021, Mr James Barasa Were from that firm filed an application dated 6th October 2021 seeking leave to cease acting for him. That application was never canvassed because when it came up for hearing, Mr Fwaya had not yet paid for it as he was having challenges doing so. Meanwhile, Mr Omondi for the Respondent reminded the Court about the delay in prosecuting the suit and the fact that his costs had not even been paid by the Applicant. He sought the dismissal of the Applicant's suit and the Court agreed.
 13. The net result of all that is that the application by Mr Fwaya to cease acting for the Applicant is still on the file but unprosecuted.
 14. Meanwhile, on 4th January 2022 the Applicant filed a Notice to act in person. On 29th July 2022, Mr Wanyama filed a Notice of Appointment on behalf of the Applicant. Mr Omondi takes the view that the said Notice of Appointment by Mr Wanyama having been filed without leave is in violation



of Order 9 Rule 9 of the Civil Procedure Rules because the dismissal of the Applicant's Originating Summons on 6th October 2021 was a judgment.

15. Order 9 Rule 9 of the Civil Procedure Rules is couched in the following terms:

“Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court-

- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

The Applicants suit having been dismissed on 6th October 2021 for want of prosecution, what followed was a judgment. That was confirmed by the Court of Appeal in the case of Peter Ngome v Plantex Company Ltd 1983 eKLR where it said per Chesoni Ag. J.A.

“In my view, a judgment is a judicial determination or decision of a Court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order IXB or under any other provision of law. A dismissal of a suit, under Rule 4(1), is a judgment for the defendant against the Plaintiff.”

The above was adopted by the Court in Njue Ngai v Ephantus Njiru Ngai & Another C.a. Civil Appeal No29 of 2015 2016 eKLR.

16. Therefore, by the time OmolloJ dismissed the Applicant's suit on 6th October 2021 resulting in a judgment for the Respondent against the Applicant, Mr Fwaya was still on record. Mr Wanyama ought, therefore, to have complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules. So too the Applicant ought to have complied with the provisions of Order 9 Rule 8 of the Civil Procedure Rules when he filed his Notice of Intention to act in person. Does that lapse render the application dated 28th July 2022 incompetent? Mr Omondi thinks so.
17. To answer that question, I have had to consider the mischief which Order 9 Rule 9 Civil Procedure Rules was intended to cure. This was expounded on by W. Korir J (as he then was) in the case of S. K. Tarwadi v Veronica Muehlmann2019 eKLR where he said:

“In my view, the essence of Order 9 Rule Civil Procedure Rules is to protect advocates from mischievous clients who will wait until a judgment has been delivered and then sack the advocate and either replace him with another advocate or act in person.”

I am in agreement with that.

I would go further and add that where, as in this case, the relationship between a party and his previous counsel has irretrievably broken down and there is really no attempt by the client to steel a march on his previous counsel, the Court should be slow to strictly demand compliance with that provision especially where the counsel on the other side is kept well informed and knows who to serve with pleadings.

18. In the circumstances of this case, it is on record that Mr Fwaya had himself sought to cease acting for the Applicant and that was well known to Mr Omondibecause that intimation was made in open Court on 6th October 2021. And when Mr Wanyama came on record on 29th July 2022 and filed his Notice of Appointment, the same was served upon Mr Omondi who subsequently served his grounds



of opposition to the application on Mr Wanyama. Therefore both counsel knew who to serve with pleadings and the previous counsel Mr Fwaya was happy because all along, he had wanted to cease acting for the Applicant. Nobody has been prejudiced and Mr Fwaya is not complaining about any outstanding fees owed to him by the Applicant. To insist on a strict application of the provisions of Order 9 Rule 8 and 9 of the Civil Procedure Rules will, in my view, be tantamount to splitting hairs.

19. I rule that Mr Wanyama is properly on record for the Applicant in these proceedings and is not a stranger as suggested by Mr Omondi.
20. Having said so, is the Applicant entitled to the remedy to set aside the orders by OmolloJ dismissing his suit on 6th October 2021 for failure to attend Court? Order 12 Rule 7 of the Civil Procedure Rules provides that:

“Where under this order judgment has been entered or the suit has been dismissed, the Court, on application may set aside or vary the judgment or order upon such terms as may be just.”

As I have already stated above citing the case of Njue Njagi v Ephantus Njiru Ngai & another (supra), the dismissal of the Applicant's suit resulted in a judgment in favour of the Respondent. That judgment is therefore also amenable to setting aside as sought by the Applicant herein. This Court, as was held in Shah v Mbogo & another 1967 EA 116, has the discretion to set aside such judgment in order to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake. In Patel v EA Cargo Handling Services Ltd 1974 EA 75, the Court expressed itself in the following terms:

“There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ...

The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given to it by the rules.”

21. The Applicant's case having been dismissed on 6th October 2021 for his non-attendance, this Court must now interrogate his explanation for that no-show. This is found in paragraphs 2, 3, 4 and 5 of his supporting affidavit. Therein, he has deposed as follows:

- 2: “That I filed my case herein and appointed Gabriel Fwaya Advocate to represent me.”
- 3: “That in the month of December 2021, I visited my advocate's office and found that my case had been dismissed due to my absence on the hearing date of 6/10/2023.”
- 4: “That I had not been notified by my advocates to attend Court on 6/10/2021 why my case was dismissed for non-attendance.”
- 5: “That my absence from Court on 6/10/2021 was not deliberate or intentional.”

To give credence to those averments, his counsel has made the following submissions:

“The Plaintiff/Applicant's absence from Court when the matter was required to proceed was not deliberate and was not intentional but was caused by failure to receive correspondence or communication from his previous advocates calling him to attend Court on specified dates. The lack of communication of the hearing dates to the Plaintiff/Applicant was occasioned by his previous advocates on record and he should be excused of such mistake to enable him to have an opportunity to be heard on the merits of his claim. The Court had indeed indicated that the Plaintiff could move Court for reinstatement of the suit and the Court is vested with



discretion to consider the plight of the Plaintiff/Applicant in his quest for (*sic*) be heard.”

To test the veracity of the Applicant’s averments, I have looked at the reasons put forward by his previous counsel when he filed his application to cease acting for him. In the supporting affidavit by Mr James Barasa Were Advocate dated 6th October 2021 and which forms part of the record herein, it is deponed at paragraphs 2, 3, 4 and 5 as follows:

- 2: “That the Applicant has been in conduct of this matter on behalf of the Plaintiff/Respondent.”
- 3: “That since 2/12/2020 my client has failed to see me for further instructions.”
- 4: “That the Plaintiff/Respondent refused to answer to our calls, reply to and or respond to correspondences from our office.”
- 5: “That the Plaintiff/Respondent has refused to pay our legal fees.”

As already stated above, that application by the Applicant’s previous counsel was not prosecuted because counsel ran into hitches when he tried to pay previous Court adjournment fees. But that affidavit by Mr James Barasa Were was subsequently filed on the same date and the Applicant must have perused it because 2 months later, he filed his Notice of Intention to act in person and which was to be served upon the firm of Gabriel Fwaya Advocates. The import of the averments in the supporting affidavit by Mr James Barasa Were are to depict the Applicant as a dishonest man. He refused to pick calls from his previous counsel or to respond to correspondences. He cannot now allege, as he purports to do, that his previous counsel kept him in the dark. Having decided to act in person, he must have known that what his previous counsel said of him in his affidavit would be relevant to what he now alleges. However, he has deliberately steered away from counsel’s averments yet they help to explain whether it is indeed true that he was not notified to attend Court. And even after he became aware in December 2021 about the dismissal of his case, it took him another 7 months to file this application. No explanation has been proffered for that delay. As was held in *Shah v Mbogo* (*supra*) and which was approved by the Court of Appeal in *Mbogo v Shah* 1968 EA 93,

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

The Applicant’s counsel has submitted, and rightly so, that the Court had indicated that the Applicant could move the Court for reinstatement of his suit. Indeed this is what Omollo J said on 6th October 2021 before dismissing the Applicant’s suit:

“The submission by counsel for the Plaintiff is taken into consideration. The case belongs to parties so a party not interested in prosecuting his case should not be allowed to clog the system. The Court does allow him room to revive his case in the future when he gets to develop interest in the case. Accordingly, the suit is dismissed for want of attendance of the Plaintiff with costs of the suit awarded to the defendant.”

With those words, Omollo J was simply restating the obvious. That the Applicant was at liberty to approach this Court to set aside the dismissal order which right is provided for in law. I do not hear the judge to be giving the Applicant à cartè blanche to walk in and out of this Court with orders in his



favour. The threshold to obtain the orders he seeks is clearly set out in precedents and the Applicant, unfortunately, has not met it. If anything, he has not demonstrated any “accident inadvertence or excusable error.” To the contrary he has “deliberately sought whether by evasion or otherwise, to obstruct or delay the cause of justice.” How else can this Court explain the conduct of a litigant who refuses to see his counsel or to answer his calls or answer correspondence other than that of a party who wants “to obstruct or delay the cause of justice.” Indeed Omollo J had identified him as far back as 6th October 2021 as a party who simply wanted “to clog the system.”

22. The Applicant’s counsel has also submitted that his client should be given a chance to prove his case. That right is guaranteed by Article 50 of the *Constitution*. However, where that right is availed, it should not be squandered. In the case of *Union Insurance Company of Kenya Ltd v Ramazan Abdul Dhanji* C.a. Civil Application No 179 of 1998, It Was Held That:

“The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it.”

In the case of B1 *MACH Engineers Ltd v James Kaboro Mwangi* C.A. Civil Application No. 15 of 2011 [2011 eKLR], WAKI JA expressed himself thus:

“The Applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the Applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the Court may consider with some sympathy. The client has a remedy against such an advocate.”

In this case, it is on record that the Applicant’s erstwhile counsel tried to call and send correspondences to his client who did not even bother to visit his office. A party seeking the exercise of the Court’s discretion in such a matter must not only make a frank and full disclosure but he must also approach the Court with clean hands. I am afraid the Applicant has not persuaded me that he is deserving of the exercise of my no doubt unfettered discretion in his favour.

23. The up-shot of all the above is that the Notice of Motion dated 28th July 2022 is devoid of merit. It is accordingly dismissed with costs.

16TH NOVEMBER 2023.

RULING DATED, SIGNED AND DELIVERED ON THIS 16TH DAY OF NOVEMBER, 2023 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

